FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 111.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

VS.

MARY Q. HALLOCK, EXECUTRIX OF THE ESTATE OF HENRY HALLOCK, DECEASED, RESPONDENT.

No. 183.

WALTER J. ROTHENSIES, COLLECTOR OF INTERNAL REVENUE, PETITIONER,

VS.

LINFORD B. CASSELL, EXECUTOR OF THE ESTATE OF GEORGE F. UBER, DECEASED, RESPONDENT.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURTS OF APPEALS FOR THE SIXTH CIRCUIT AND THIRD CIRCUIT.

BRIEF OF AMICUS CURIAE.

BLATCHFORD DOWNING,
McCUNE, CALDWELL & DOWNING,
2000 Fidelity Building,
Kansas City, Missouri,
Amicus Curiae.

INDEX

Table of Cases

STATUTES

TEXTS

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 111.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

VS.

MARY Q. HALLOCK, EXECUTRIX OF THE ESTATE OF HENRY HALLOCK, DECEASED, RESPONDENT.

No. 183.

WALTER J. ROTHENSIES, COLLECTOR OF INTERNAL REVENUE, PETITIONER,

VS.

LINFORD B. CASSELL, EXECUTOR OF THE ESTATE OF GEORGE F. UBER, DECEASED, RESPONDENT.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURTS OF APPEALS FOR THE SIXTH CIRCUIT AND THIRD CIRCUIT.

BRIEF OF AMICUS CURIAE IN SUPPORT OF AFFIRMANCE.

Interest of Amicus Curiae, Blatchford Downing.

The interest of the undersigned, an attorney of the Bar of this Court, is that he is attorney for the respond-

ent taxpayers in a certain cause entitled "*Guy T. Helvering, Commissioner, Petitioner, v. Mercantile Commerce Bank & Trust Company, a corporation, and Virginia G. Donnelly, co-administrators de bonis non of the Estate of Paul F. Donnelly, deceased, respondents, No. 11572,*" now pending before the United States Circuit Court of Appeals for the Eighth Circuit on petition by the Commissioner for review of the decision of the same matter by the United States Board of Tax Appeals reported in 38 B. T. A. 1234, which cause involves as a major contention on behalf of the Commissioner, the same point that is primarily involved in the cases at bar.

Nature of Cases and Questions Involved.

In the *Hallock* case decedent, Henry Hallock, as grantor during his lifetime, by act *inter vivos* and not in contemplation of death, created a trust for the benefit of his wife, Anne Lamson Hallock, in contemplation of divorce between them, for her life ~~with remainder over in fee to the Hallock children,~~ but with provision that if the life beneficiary, Anne, predeceased grantor, Henry Hallock, the property should revert to said grantor ~~for his~~ & then ~~life with remainder over~~ to the Hallock children.

In the *Rothensies* case, the decedent, George F. Uber, as grantor, in his life, by act *inter vivos* and not in contemplation of death, created a trust for the benefit of his fiancee, R. S., with provision that if the beneficiary, R. S., predeceased grantor, the trust properties should revert in fee to grantor, but if the beneficiary should after the marriage, survive the grantor, the trust should terminate and the properties remain vested in the beneficiary, freed from the trust.

In each case the grantor predeceased the beneficiary.

The question presented is: Does the existence of the possibility of reverter to grantor in the event of the death of the first beneficiary in grantor's life, operate to cause incidence of the estate tax upon the estate of grantor at

his death, the first beneficiary having survived. A difference between the two cases consists in the fact that in the Hallock case the first beneficiary's estate was for life only with remainder to the Hallock children subject to the intervening possibility of reverter to grantor ~~for the remainder of his life only and~~ if living then to the children, while in the Rothensies case there was no remainder over to third parties. The difference is, we submit, immaterial in view of the suggestions which we desire to present for the Court's consideration.

SUMMARY OF THE ARGUMENT.

(a)

The scope and express terms of the provisions of Sec. 302 (c) and (d) are restricted in application to include in gross estate, transfers *inter vivos* which are of types reasonably adaptable for use as devices to evade the tax, *i. e.*, to retain economic benefit; accomplish the equivalent of a testamentary disposition at death; and yet avoid the estate tax. The transfers involved herein are the diametric opposite. Grantor did not *retain* but *alienated* the economic enjoyment. He did this for the duration of the life of the first beneficiary, an indeterminate term capable of exceeding grantor's life. The reverter, to grantor, contingent upon death of the first beneficiary and grantor's survivorship, would if it materialized defeat instead of accomplish the equivalent of a testamentary disposition free from estate tax.

The provisions of Sec. 302 (c) and (d) create exceptions to transfers *inter vivos*, which would otherwise be exempt from estate tax. They cannot be enlarged beyond their strict language, nor interpreted to include transfers having none of the fundamental characteristics of testamentary dispositions. The intent of Congress to preserve the distinction between the scope of the Gift Tax Act and that of the Estate Tax Act must be given effect. *Sanford's Estate* v. *Commissioners* (No. 34. Present Term) emphasized that the distinction is to be preserved.

(b)

While the Estate Tax is properly imposed upon a *shift* of economic benefits caused by death, regardless of technical refinements of title, the question whether the shift was caused by death, as the generating source, or by act *inter vivos*, is determined by the test whether at

decedent's death grantor had retained any *power to change* at will the ultimate devolution of the property. If this power to change the economic shift was terminated at and by death, the Estate Tax applies. If it was terminated by act *inter vivos* (and not in contemplation of death, or with retention of beneficial ownership and enjoyment for duration of grantor's life or for period equivalent thereto in practical result) the Estate Tax does not apply.

(c)

The possible reverter to grantor contingent upon his survivorship of the life beneficiary could not materialize, or take effect in possession or enjoyment at or after grantor's death. It had to do so, if at all, during his life. In such event it would thereafter be subject to estate or gift taxes.

(d)

Since grantor's interest, and the fact of retention or no retention, was contingent upon grantor's survivorship of the life beneficiary, the taxability of the fund is likewise contingent on such survivorship by grantor. Since the contingency did not occur, taxability did not occur.

(e)

The government is not cheated of its taxes. The contingent reverter, not having vested or materialized, is as if it had not been. If it had materialized and been transformed into a vested estate in grantor, it would thereafter be subject to estate tax or gift tax upon its termination by death or alienation by gift.

(f)

To impose an estate tax when there was no vested property interest capable of transfer from dead to living or capable of valuation to measure the tax at death,

would be so arbitrary and fictitious as to violate the intent of Congress to preserve the distinction between Estate Tax and Gift Tax, and thereby also violate the Fifth Amendment.

(g)

The St. Louis Union Trust Co. cases were in the light of the subsequent manifestations of the Congressional intent, as indicated in *Sanford's Estate* v. *Commissioner*, correctly decided. *Klein* v. *United States* is distinguishable.

ARGUMENT.

I.

Section 302 (c) of the Act Is Applicable Neither by Its Terms Nor Its Spirit and Intent to the Trusts Here Involved.

In contending that Section 302 (c) of the Act is applicable to the trusts here involved, we respectfully suggest that counsel for the Commissioner overlook the essential distinction between retention of a life estate preceding the estate granted and the creation of a contingent remainder, or a mere possibility of reverter after the estate granted. Retention of a life estate assures to grantor the economic enjoyment for life and accomplishes the equivalent of a testamentary disposition thereafter. The creation of a contingent remainder or mere possibility of reverter in favor of grantor after the termination of the life estate granted, on the other hand, is precisely the opposite. It relinquishes present enjoyment; and the possible reverter, if it ever materializes, by the very same contingency defeats accomplishment of the equivalent of a testamentary disposition. It revests the property in the grantor, *thereafter* to become subject to estate tax on his death.

Section 302 (c) of the Act as amended by the joint resolution of March 3, 1931, and the Revenue Act of 1932, provides for inclusion in the gross estate to the extent of any interest of which decedent has at any time made a transfer, "intended to take effect in possession or enjoyment at or after his death." This is the fundamental or paramount provision of the section, of which the subsequent clauses are enlargements for the safeguarding of this fundamental clause. Obviously the possible reverters here under consideration can never take effect

at or *after* grantor's death. On the direct contrary, they can only take effect, if at all, in his life. His death occurring prior to the death of the life beneficiary, will completely defeat them.

Coming to the succeeding clauses of the section, the grantor in these trusts has not retained for his life or for any period having relation to his death within the meaning of the section, the possession or enjoyment of, or the right to the income from, the property. On the contrary, far from retaining such, he has expressly alienated the possession, enjoyment and right to the income for the life of the first beneficiary, an indefinite period of duration unknown to grantor and beyond his control; with possibility, as actually transpired, of depriving him of all further ownership, control or enjoyment.

The creation of this reverter being only a possible reverter dependent upon events beyond grant[illegible] control was not a *retention* of the use, possession or income from the property, or of control thereof. It was on the contrary a divestiture thereof. If the contingency occurred it would result in the vesting of a new or subsequent estate, springing into being only upon the happening of the contingency (thereafter to be subject to gift or estate tax). It would not be an estate retained by him, nor one of duration extending from the date of the grant to his death equivalent to a retention of ownership for life. The provisions of Section 302 (c) and (d) subjecting to the estate tax certain types of transfers *inter vivos* are limited to those types of transfer which would be appropriate and reasonable to be resorted to by anyone seeking to avoid estate taxes, while at the same time accomplishing the equivalent of a taxable testamentary disposition. It is entirely competent and appropriate that Congress should by these provisions include within taxable transfers all such devices as might otherwise be reasonably resorted to to avoid the tax.

The transfers in the cases at bar are not such that any person would reasonably resort to them to evade the es-

tate tax by retaining the equivalent of beneficial enjoyment for life, and accomplishing the equivalent of a testamentary disposition thereafter. On the contrary, such transfers as these would defeat both objects. Instead of retaining beneficial enjoyment for life or a period having relation to the duration of donor's life, the grantor has *alienated* the beneficial ownership, and for a period to be determined by the life of the life beneficiary, a period which has no relation to grantor's life and may or may not exceed it. Instead of accomplishing the equivalent of a testamentary disposition after his own death, he has created a possibility that at the death of the life beneficiary the property may revest in grantor thereafter to be subject to estate taxes on his subsequent death.

In *Helvering* v. *Bullard*, 303 U. S. 297, the court said:

> "A further vindication of the exaction is the authority of Congress to treat as testamentary transfers with reservation of a power or an interest in the donor. The legislative history of the Joint Resolution, to which reference is made in *Hassett* v. *Welch*, 303 U. S. 303, *post*, 858, 58 S. Ct. 559, decided this day, demonstrates that the purpose of the legislation was to prevent avoidance of estate taxes. As has been said by the Court of Appeals of New York: 'It is true that an ingenious mind may devise other means of avoiding an inheritance tax, but the one commonly used is a transfer with reservation of a life estate.' "

In *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85, the court said, l. c. 89:

> "Congress may adopt a measure reasonably calculated to prevent avoidance of a tax. The test of validity in respect of due process of law is whether the means adopted is appropriate to the end. A legislative declaration that a status of the taxpayer's creation shall, in the application of the tax, be deemed the equivalent of another status, falling normally within the scope of the taxing power, if reasonably requisite to prevent evasion, does not take property

without due process. But if the means are unnecessary or inappropriate to the proposed end, are unreasonably harsh or oppressive, when viewed in the light of the expected benefit, or arbitrarily ignore recognized rights to enjoy or to convey individual property, the guaranty of due process is infringed."

The provisions of Sections 302 (c) and (d) are measures reasonably calculated to prevent avoidance of the tax, to the extent, and only to the extent, that they are applied strictly in accordance with their terms, to transfers which might reasonably have been resorted to as devices for avoidance of the tax.

These various provisions of Section 302 (c) and (d) relating to transfers *inter vivos* under which reservations are made of powers or interests for the grantor's life, powers of revocation or modification, etc., were grafted onto the main provision of subjecting to the estate tax transfers to take effect in possession or enjoyment at or after grantor's death, as extensions thereof to prevent evasions of the estate tax while accomplishing practically testamentary dispositions. They create exceptions to otherwise estate tax exempt transfers *inter vivos,* reasonably necessary to effectuate the true scope and purport of the estate tax.

To apply them to the transfers involved in the cases at bar, one a trust to secure alimony payments for life, the other to constitute a pre-nuptial gift in the nature of a marriage settlement, neither purpose being even remotely testamentary or tax evasive would be hyper-technical in the extreme.

The transfers were preeminently for purposes related to life, not death. It was, of course, necessary to provide for events of termination and subsequent devolution to avoid hiatus in the beneficial title, and the Rule Against Perpetuities.

The Court should not engraft by judicial decision further extensions of these provisions of Section 302 (c) and (d) beyond what the Congress has specifically en-

acted. Nor should it by judicial interpretation so enlarge the scope and effect of these exceptions to freedom of gifts *inter vivos* from death duties, as to distort the true scope and purport of the Act as applying solely to transfers essentially testamentary and transfers resorted to as substitutes for testamentary transfers to evade estate taxes.

The essential distinctions between gift taxes and estate taxes emphasized and given effect in *Sanford's Estate* v. *Commissioner* should be preserved.

The purposes of the amendments in 1932 to Section 302 (c) adopted to cover other ingenious devices to evade the estate tax are thus stated in the Senate Finance Committee's Report on the Revenue Bill of 1932 (Vol. 3, C. C. H. Service, 1939, Par. 3417.02, p. 5620):

> "(1) The insertion of the words 'or for any period not ascertainable without reference to his death,' is to reach, for example, a transfer where decedent reserved to himself semiannual payments of the income of a trust which he had established, but with the provision that no part of the trust income between the last semiannual payment to him and his death should be paid to him or his estate, or where he reserves the income, not necessarily for the remainder of his life, but for a period in the ascertainment of which the date of his death was a necessary element.
>
> "(2) The insertion of the words 'or for any period which does not in fact end before his death,' which is to reach, for example, a transfer where decedent, 70 years old, reserves the income for an extended term of years and dies during the term, or where he is to have the income from and after the death of another person until his own death, and such other person predeceases him. This is a clarifying change and does not represent new matter."

With respect to the possible applicability of the first paragraph above quoted to the cases at bar it is to be noted as elsewhere herein pointed out that the grantor

did not "reserve" or "retain" the trust income or the use, enjoyment, etc., of the property. "Reserve" and "retain" signify continuing to hold what one now holds.[1] Grantors herein alienated use, possession, ownership, enjoyment and income irrevocably without power to recall. The mere contingent possibility of a subsequent new revesting springing from the alienation on the death of the first beneficiary, if grantor survived, is not a retention or reservation nor one for a period in the ascertainment of which the date of the grantor's death was a necessary element.

With respect to the possible applicability of the second paragraph above quoted, note the additional clause in the next to the last sentence "or where he is to have the income from and after the death of another person until his own death, *and such other person predeceases him.*"

In the cases at bar the "other person," *i. e.*, the first beneficiary, did not predecease grantor. This language explanatory of the Congressional intent completely and specifically negatives and rebuts the applicability of Section 302 (c) to the cases at bar. On the other hand it confirms our contention that if the first beneficiary had predeceased the grantor, grantor would then be revested with an estate which would become taxable upon his subsequent death thereafter or subsequent alienation by gift. This exactly confirms that if the revesting is contingent the taxability is contingent.

The transfers in the cases at bar are not within the letter and certainly not within the spirit and intent of these amendatory provisions which are themselves exceptions to the general rule of estate tax exemption of transfers *inter vivos*.

---

[1] "Reserve. 2. To keep back; to retain or hold over to a future time or place; not to deliver, make over, or disclose at once.

Retain. 2. To continue to hold, have, use, recognize, etc.; to keep in possession, control, use, custody, etc.; to keep; not to lose, part with, dismiss, or permit to escape."

Webster's New International Dictionary.

Again, the property interest which is to be included in the gross estate is to be valued as of the time of decedent's death. The only interest in the property transferred which decedent had at or prior to his death was the possibility of a reverter which did not materialize but was destroyed at his death. This possibility of reverter obviously had no value at any time; if the contingency of survivorship occurred, then for the first time, upon being transformed into a vested estate, it would have value, and would also thereafter be taxable at his death occurring subsequently. To attempt to create an artificial value by legislative fiat would be so contrary to fact and reason as to be utterly arbitrary and violative of the 5th Amendment. It would be like levying a poll tax upon "the man who was not there."

II.

The Incidence of the Estate Tax Is Dependent upon Termination by Death of the POWER TO CONTROL Further the Ultimate Devolution of Property. It Is Not Imposed upon Mere Change in Economic Benefit Resulting from Acts Completed Inter Vivos.

While it is true that the estate tax is imposed upon a shift in economic ownership of property regardless of technical refinements as to the legal title or estate therein involved, this tax is not imposed upon all shifts of ownership, but only upon those having their origin in death as the generating source, as distinguished from acts completed *inter vivos*.

To determine whether the economic shift owes its origin to death on the one hand or to act *inter vivos* on the other, the essential test is whether at death decedent retained any vestige of power to control the subsequent devolution of the property, or whether its devolution had been completely fixed beyond recall or change by act *inter vivos*.

In *Porter* v. *Commissioner,* 288 U. S. 436, the court said (l. c. 444):

> "But the reservation here may not be ignored for, while subject to the specified limitation, it made the settlor *dominant in respect of other dispositions* of both corpus and income. *His death terminated that control, ended the possibility of any change by him,* and was, in respect of title to the property in question, the source of valuable assurance passing from the dead to the living. *That is the event on which Congress based the inclusion* of property so transferred in the gross estate as a step in the calculation to ascertain the amount of what in Section 301 is called the net estate. Thus was reached what it reasonably might deem a substitute for testamentary disposition. *United States* v. *Wells,* 283 U. S. 102, 116, 75 L. Ed. 867, 875, 51 S. Ct. 446" (italics supplied).

In *Sanford's Estate* v. *Commissioner,* (Docket No. 34, Present Term) ---- U. S. ----, 84 L. Ed. (Adv. Op.) 53, in construing the applicability of the gift tax, which is to be interpreted *in pari materia* with the estate tax, the donor had completely and irrevocably divested himself of all possibility of economic enjoyment beneficial to himself, of the property prior to the effective date of the Gift Tax Act, but he had retained the power to control the ultimate devolution of the property until his later relinquishment thereof after the effective date of the Gift Tax Act.

In *Sanford's Estate* v. *Commissioner,* the court said, L. Ed. Adv. Op. p. 56:

> "Since it was the relinquishment of the *power* which was taxed as a transfer and not the transfer in trust, the statute was not retroactively applied. Cf. *Nichols* v. *Coolidge,* 274 U. S. 531, 71 L. Ed. 1184, 47 S. Ct. 710, 52 A. L. R. 1081; *Helvering* v. *Helmholz,* 296 U. S. 93, 98, 80 L. Ed. 76, 80, 56 S. Ct. 68.
>
> "The rationale of decision in both cases is that 'taxation is not so much concerned with the refinements of title as it is with the actual *command* over

the property taxed.' See *Corliss* v. *Bowers*, 281 U. S. 376, 378, 74 L. Ed. 916, 917, 50 S. Ct. 336; *Saltonstall* v. *Saltonstall, supra* (276 U. S. 271, 72 L. Ed. 568, 48 S. Ct. 225); *Burnet* v. *Guggenheim, supra* (288 U. S. 287, 77 L. Ed. 752, 53 S. Ct. 369), and that a retention *of control* over the disposition of the trust property, whether for the benefit of the donor or others, renders the gift incomplete until the *power is relinquished* whether in life or at death. The rule was thus established, and has ever since been consistently followed by the Court, that a transfer of property upon trust, with *power* reserved to the donor either to revoke it and recapture the trust property or to modify its terms so as to designate new beneficiaries other than himself, is incomplete, and becomes complete so as to subject the transfer to death taxes only on *relinquishment of the power* at death" (Italics supplied).

This Court has held that although a grantor had in fact transferred in his lifetime the complete beneficial ownership of property yet, if he had reserved the right to recall or change the devolution thereof, even though such right was not in fact exercised, and even though it could not be exercised in his own favor, yet the termination of the right by death furnished the essential basis for the incidence of the estate tax.

This Court has consistently held that it is the termination, by death, of a retained power to control future devolution of property that determines incidence of the estate tax, while, on the other hand, if this termination of power to control is effected by act *inter vivos*, the Gift Tax Act and not the Estate Tax Act applies (assuming the gift is not in contemplation of death, nor with reservation of life estate to donor capable of being used as a device to evade).

In *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, the court had held that the falling in of a life estate at death of the life tenant effecting transfer or economic shift to the remainderman under a trust created *inter vivos* was

not a transfer having its origin in death as a generating source, but had its origin in the *inter vivos* act of the settlor and hence was not within the terms of the Estate Tax Act.

Chase National Bank v. *U. S.*, 278 U. S. 327, decided on the same date, held, on the other hand, that where life insurance policies had by act *inter vivos* been made payable to beneficiaries, but the decedent had retained the right to recall or change beneficiaries, which right was terminated only at his death, the proceeds of the insurance were properly includible in the gross estate for estate tax purposes. The court in the Chase National Bank case emphasized that since the transfer was incomplete and not beyond control until death, death was the generating source, the court saying, 73 L. Ed. 409:

> "Termination of the power of control at the time of death inures to the benefit of him who owns the property subject to the power, and thus brings about, at death, the completion of that shifting of the economic benefits of property which is the real subject of the tax, just as effectively as would its exercise, which latter may be subjected to a privilege tax. *Chanler* v. *Kelsey*, 205 U. S. 466, 51 L. Ed. 882, 27 Sup. Ct. Rep. 550."
>
> * * * * * * *
>
> "As it is the termination of the power of disposition of the policies by decedent at death which operates as an effective transfer and is subjected to the tax, there can be no objection to measuring the tax or fixing its rate by including in the gross estate the value of the policies at the time of death, together with all the other interests of decedent transferred at his death. *Stebbins* v. *Riley*, 268 U. S. 137, 69 L. Ed. 884, 44 A. L. R. 1454, 45 Sup. Ct. Rep. 424."

Consequently, if the power to change future devolution is completely relinquished *inter vivos*, the act *inter vivos* is the cause of the transfer or economic shift and death is not the generating source.

In *May* v. *Heiner*, 281 U. S. 238, decedent had created a trust with income payable to her husband during his life and upon his death to decedent for her life with remainder over to her children. The trust was irrevocable. In holding it not subject to estate tax as the act then read, the court said (l. c. 243):

> "It was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event."

III.

Helvering v. St. Louis Union Trust Co. and Becker v. St. Louis Union Trust Co. Were Correctly Decided. Klein v. United States Is Distinguishable.

That *Helvering* v. *St. Louis Union Trust Co.*, 296 U. S. 39, and *Becker* v. *St. Louis Union Trust Co.*, 296 U. S. 48, were correctly decided and reached correct results is, we submit, amply confirmed by the recent decision in *Sanford's Estate* v. *Commissioner* (No. 34 Present Term), decided when the Congressional *intent* had become more manifest. Accordingly, the cases at bar should be affirmed. The essence of the matter is, we believe, clearly stated in *Helvering* v. *St. Louis Union Trust Co.*, 296 U. S., at pages 41-53, which we ask the Court to consider in the light of the Sanford's Estate case.

If we may be permitted to suggest it, does not the dissenting opinion in *Helvering* v. *St. Louis Union Trust Co.* overlook, or at least not give sufficient importance to, the predominate idea that Section 302 (c) of the Act was to govern gifts *inter vivos* which, by their provisions, are "intended to take effect in possession or enjoyment at or after death" and thereby accomplish the same result in practical effect as a testamentary disposition? When,

as in the St. Louis Union Trust Co. case and in the cases at bar, the grantor alienated and divested himself of the immediate possession or enjoyment, by granting the life estate to the immediate beneficiary, he effected the direct opposite of a retention of the possession or enjoyment for his life or the equivalent thereof. He alienated them for the period of the life beneficiary's life. If the contingent reverter was, at the death of the first life beneficiary, to revert to grantor only in the event he was then alive, obviously it was not one to take effect at or after his death, but the direct contrary.

If the contingency had occurred and the possibility of reverter had materialized, then grantor would have been again vested with a ~~life~~ estate which he had himself created in his own favor ~~with remainder over~~, but not with one which he had *retained,* since he had alienated it beyond his power to change, dominate or control. It might then, at his death *thereafter,* properly become subject to estate taxes under Section 302 (c) upon his subsequent death. On the other hand, if the first contingency does not occur, grantor will never become revested with anything and will not have retained anything. In other words, since the revesting in grantor is contingent upon his survivorship of the life beneficiary, the taxability of the trust at his death is, likewise, contingent upon his surviving the life beneficiary. He will have created an estate to take effect at or after his death only in the event he shall have survived the life beneficiary, a contingency irrevocably fixed *inter vivos* and beyond his control.

Furthermore, does not the dissenting opinion fail to give sufficient consideration to the essential point emphasized in *Sanford's Estate* v. *Commissioner* and in *Chase National Bank* v. *United States,* that if the future devolution of the property is irrevocably fixed by act *inter vivos,* beyond any reserved power of grantor to change or control any subsequent shift of the economic

benefit, it is not due to death as a generating source, but to the act *inter vivos.*

The provisions of Section 302 (c) for taxability where a life estate, or its equivalent, is retained are exceptions to and outside the scope of the principle that death must be the generating source of the transfer and were enacted for the purpose of preventing estate tax evasions by adoption of technical methods having the practical effect of accomplishing retention of ownership for life and a testamentary disposition thereafter. In the cases at bar, grantor did not *retain* a life estate continuing the economic enjoyment *in praesenti* at the execution of the trust, but, on the contrary, alienated the possession and enjoyment for the duration of the first life beneficiary. The grants were in no sense equivalent to testamentary dispositions either in their purpose or effect, and were not made as evasions or avoidance of estate taxes. See *Helvering* v. *City Bank Farmers Trust Co.,* 296 U. S. 85, l. c. 89.

Klein v. *United States,* 283 U. S. 231, is plainly distinguishable on its face, and as frequently pointed out both in the St. Louis Union Trust Company cases and numerous lower court decisions. The deed in the Klein case consisted of two sections—the first granting the wife merely a life estate, and the second granting her the fee upon the condition *precedent* that she survive grantor. The court emphasized the separateness of these two clauses, saying, "The two clauses of the deed are quite distinct—the first conveys the life estate; the second deals with the remainder." It was precisely as if two separate deeds had been executed—the first conveying a life estate immediately; the second embodying merely a conditional grant of the fee, which latter grant was to become effective only upon the death of grantor and grantee's survivorship. If the condition precedent of grantee's survivorship did not occur, the remainder fee would have remained vested in grantor and passed by

his will or under the laws of intestacy, not by virtue of the terms of the trust.

The distinction between a condition precedent to vesting of an estate, and a condition subsequent causing a divesting thereof, though it may seem technical may nevertheless be the determining factor as to whether property passes by will or intestacy and subject to administration, or passes by virtue of the deed and without administration. The attempt to impose an estate tax upon a transfer, nontestamentary in character and intent, merely because there was included a mere possibility of reverter that never in fact materialized, is, we submit, decidedly more technical and devoid of justifying basic substance.

In fact in *Klein* v. *United States*, 283 U. S. 231, upon which the Commissioner relies so heavily, the decision essentially turned on the distinction between a condition precedent to the vesting of the grant and a condition subsequent which might cause a divesting. In the first instance there would be a "retaining" unless and until the contingency occurred. In the second instance, there would be an immediate alienation subject merely to possible revesting. In the *Klein case* the Court said, l. c. 233:

> "By the second clause the grantee takes the fee in the event—'and in that case only'—that she shall survive the grantor. It follows that only a life estate immediately was vested. The remainder was retained by the grantor; and whether that ever would become vested in the grantee depended upon the condition precedent that the death of the grantor happen before that of the grantee. The grant of the remainder, therefore, was contingent."

In the cases at bar the original grant of the entire estate was not contingent upon a condition precedent. It was the possible reverter that was so contingent, the converse of the Klein case. Hence the Klein case supports the taxpayers' contentions herein.

IV.

Independently of Constitutional Power, It Is Not Within the Intent of Congress to Subject to Estate Tax Transfers Completely and Irrevocably Fixed by Act Inter Vivos When the Transfer Is Not in Contemplation of DEATH AND NO EQUIVALENT OF A LIFE ESTATE IS RESERVED.

In *Heiner* v. *Donnan*, 285 U. S. 312, the court held unconstitutional the provisions of Section 302 (d) of the Revenue Act of 1926 establishing a conclusive presumption that gifts made within two years of death were made in contemplation of death and, therefore. subject to the estate tax. In arriving at this conclusion that such a provision was so arbitrary and unjust as to violate the Fifth Amendment, the court pointed out that when a gift, completely executed *inter vivos*, without reservation of power to recall or change, and not made in contemplation of death, was subjected to the estate tax, certain utterly unreasonable and unjust results were entailed. The donor who received the entire property involved was subjected to no diminution in value thereof by the tax. The beneficiaries of the donor's estate upon his death, who had received no portion of the gift, were subjected to the burden of payment of tax on the gift. The amount of the tax was measured by the value of the property as of the time of donor's death not at its value as of the date of the gift.

In *Chase National Bank* v. *United States*, *supra*, when it was urged that a similar unjust result would be effected, the court sustained the constitutional validity of the incidence of the estate tax by pointing out that since the decedent had reserved the right to recall or change the beneficial interests under the insurance policies until his death, the gift was not complete until the death, hence, there was nothing unjust or unconstitutionally arbitrary in imposing the burden of the estate tax partly

upon the beneficiaries of the insurance, and partly upon the beneficiaries of the remaining estate, the amounts being valued as of the date of death as that was the final completion of the transfer.

In *Helvering* v. *Bullard*, 303 U. S. 297, the court held there was nothing *unconstitutional* in including for estate tax purposes a complete and irrevocable gift *inter vivos* (but which reserved a life estate to the grantor) inasmuch as Congress might by appropriate legislation have taxed the transfer as a gift and "it is of no significance that the exaction is denominated an estate tax or is found in a statute purporting to levy an estate tax," and the court held further that Congress might constitutionally classify gifts of different sorts and impose excise taxes at one rate upon a gift without reservation of life estate and at another rate upon gifts with such reservation. The events involved in *Helvering* v. *Bullard*, occurred during the interim between the repeal in 1926 of the 1924 gift tax and the reenactment of the Gift Tax Act of 1932. However, when Congress reenacted the Gift Tax Act and subsequently amended both it and the Estate Tax Act, it made no classification such as Mr. Justice Roberts suggested in the Bullard case, but on the contrary, gave expression to an intent to preserve the distinction between gift tax and estate tax. The distinction is, as forcibly illustrated by Mr. Justice Stone's opinion in *Sanford's Estate* v. *Commissioner*, that if the termination of the *power* to control the subsequent devolution of property was terminated by act *inter vivos*, then the transaction is governed by the Gift Tax Act. If the termination of this power is by death alone, it is subject to the Estate Tax Act.

In the case at bar the termination of all *power of control* had been completely effected by act *inter vivos*. It is an immaterial and fortuitous circumstance that at the time of such termination there may or may not have been a gift tax in effect. The intent of the Congress,

as distinguished from its constitutional power, in enacting and amending the Estate Tax Act is to be interpreted in accordance with these principles of *Sanford's Estate* v. *Commissioner.*

It should further be noted that in *Helvering* v. *Bullard,* the court relied for further constitutional support of the exaction on the fact that in that case the decedent had retained a true life estate and the court relied (303 U. S. l. c. 301-302) upon "the authority of Congress to treat as testamentary transfers with reservation of the power or interest in the donor" and further pointed out that the commonly used device for avoidance of estate taxes is a transfer with reservation of a life estate.

As heretofore pointed out, a reservation of a possibility of reverter is not the retention of a life estate, and if the reverter ever materializes, it is effective to restore the estate to the grantor, subjecting it to the possibility thereafter of estate tax and, accordingly, defeats any attempt to accomplish a testamentary disposition or to avoid succession taxes.

In the Hallock case now before the court, if the Commissioner's contentions should be sustained, there would be precisely the situation of arbitrary and unjust exaction which the court condemned as unconstitutional in *Heiner* v. *Donnan,* 285 U. S. 312, namely, the first wife, Anne Lamson Hallock, received and continues to enjoy the full beneficial use of the trust properties without diminution by payment of any tax, while the beneficiaries of Mr. Hallock's estate, presumably including his second wife as well as his children, are subjected to the imposition of the tax upon their shares of his estate, measured by the amount of value at his death of the property which he had in 1919 transferred in trust for the first wife. We

earnestly ask the Court to read and carefully consider that portion of the opinion in *Heiner* v. *Donnan*, 235 U. S., beginning at page 330 to page 332.

Respectfully submitted,

BLATCHFORD DOWNING,
McCUNE, CALDWELL & DOWNING,
2000 Fidelity Building,
Kansas City, Missouri,
Amicus Curiae.

pages 1, 2, 3, 5, 6, 10

SUPREME COURT OF THE UNITED STATES.

Nos. 110, 111, 112, 183 and 399.—October Term, 1939.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, 110 *vs.* Mary Q. Hallock and Central United National Bank of Cleveland, Trustees. Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, 111 *vs.* Mary Q. Hallock, Executrix, Estate of Henry Hallock, Deceased. Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, 112 *vs.* S. H. Squire, Superintendent of Banks of the State of Ohio, etc.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.
Walter J. Rothensies, Collector of Internal Revenue for the First District of Pennsylvania, Petitioner, 183 *vs.* Craig Huston, Administrator d.b.n.c.t.a. of the Estate of George F. Uber, Deceased.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.
Waldo G. Bryant and Ida Bryant, Executors of the Estate of Waldo C. Bryant, Deceased, Petitioners, 399 *vs.* Guy T. Helvering, Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 29, 1940.]

Mr. Justice Frankfurter delivered the opinion of the Court.

These cases raise the same question, namely, whether transfers of property *inter vivos* made in trust, the particulars of which will later appear, are within the provisions of § 302(c) of the Revenue

Act of 1926.[1] They were heard in succession and may be decided together. In each case the Commissioner of Internal Revenue included the trust property in the decedent's gross estate. In Nos. 110, 111 and 112 ~~affecting three beneficiaries under the same instrument~~ this determination was reversed by the Board of Tax Appeals (34 B. T. A. 575) and the Board was affirmed by the Circuit Court of Appeals for the Sixth Circuit (102 F. (2d) 1). In No. 183, the taxpayer paid under protest, successfully sued for recovery in the District Court for the Eastern District of Pennsylvania, and his judgment was sustained by the Circuit Court of Appeals for the Third Circuit. (103 F. (2d) 834). In No. 399, the Commissioner was in part successful before the Board of Tax Appeals (36 B. T. A. 669) and the Circuit Court of Appeals for the Second Circuit affirmed the Board (104 F. (2d) 1011).

Neither here nor below does the issue turn on the unglossed text of § 302(c). In its enforcement, Treasury and courts alike encounter three recent decisions of this Court, *Klein* v. *United States*, 283 U. S. 231, *Helvering* v. *St. Louis Trust Co.*, 296 U. S. 39, and *Becker* v. *St. Louis Trust Co., Ibid.* 48. Because of the difficulties which lower courts have found in applying the distinctions made by these cases and the seeming disharmony of their results, when judged by the controlling purposes of the estate tax law, we brought the cases here. 308 U. S. —; *Ibid.* —; *Ibid.* —. All involve dispositions of property by way of trust in which the settlement provides for return or reversion of the corpus to the donor

---

[1] c. 27, 44 Stat. 9, as amended by § 803 of the Revenue Act of 1932, c. 209, 47 Stat. 169, 279:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

. . . .

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

n a contingency terminable at his death. Whether the transfer
le by the decedent in his lifetime is "intended to take effect in
session and enjoyment at or after his death" by reason of that
ch he retained, is the crux of the problem. We must put to one
questions that arise under sections of the estate tax law other
n § 302(c)—sections, that is, relating to transfers taking place
leath. Section 302(c) deals with property not technically pass-
at death but with interests theretofore created. The taxable
nt is a transfer *inter vivos*. But the measure of the tax is the
ne of the transfered property at the time when death brings it
enjoyment.

or r

Ve turn to the cases which beget the difficulties. In *Klein*
United States, supra, decided in 1931, the decedent during
lifetime had conveyed land to his wife for her lifetime, "and
he shall die prior to the decease of said grantor then and in that
nt she shall by virtue hereof take no greater or other estate in
lands and the reversion in fee in and to the same shall in that
it remain vested in said grantor, ..." The instrument fur-
r provided, "Upon condition and in the event that said grantee
l survive the said ~~said~~ grantor, then and in that case only the
l grantee shall by virtue of this conveyance take, have, and hold
said lands in fee simple, ..." The taxpayer contended
t the decedent had reserved a mere "possibility of reverter"
that such a "remote interest",[2] extinguishable upon the grant-
death, was not sufficient to bring the conveyance within the
oning of the taxable estate. This Court held otherwise. It
ected formal distinctions pertaining to the law of real property
rrelevant criteria in this field of taxation. "Nothing is to be
ned", it was said, "by multiplying words in respect of the
ious niceties of the art of conveyancing or the law of contingent
vested remainders. It is perfectly plain that the death of the
ntor was the indispensable and intended event which brought the
er estate into being for the grantee and effected its transmis-
from the dead to the living, thus satisfying the terms of the
ng act and justifying the tax imposed." *Klein* v. *United States*,
ra, at 234.

he inescapable rationale of this decision, rendered by a unani-
s Court, was that the statute taxes not merely those interests
h are deemed to pass at death according to refined technicali-

---

etitioner's Brief, Klein v. United States, pp. 11-13.

ties of the law of property. It also taxes *inter vivos* transfers that are too much akin to testamentary dispositions not to be subjected to the same excise. By bringing into the gross estate at his death that which the settlor gave contingently upon it, this Court fastened on the vital factor. It refused to subordinate the plain purposes of a modern fiscal measure to the wholly unrelated origins of the recondite learning of ancient property law. Surely the *Klein* decision was not intended to encourage the belief that a change merely in the phrasing of a grant would serve to create a judicially cognizable difference in the scope of § 302(c), although the grantor retained in himself the possibility of regaining the transferred property upon precisely the same contingency. The teaching of the *Klein* case is exactly the opposite.[3]

In 1935 the *St. Louis Trust* cases came here. A rational application of the principles of the *Klein* case to the situations now before us calls for scrutiny of the particulars in the *St. Louis* cases in order to extract their relation to the doctrine of the earlier decision.

In *Helvering* v. *St. Louis Trust Co., supra,* the decedent had conveyed property in trust, the income of which was to be paid to his daughter during her life, but at her death "If the grantor still be living, the Trustee shall forthwith . . . transfer, pay, and deliver the entire estate to the grantor, to be his absolutely." But "If the grantor be then not living" then the income was to be devoted to the settlor's wife if she were living, and upon the death of both daughter and wife, if he were not living, the trust property was to go to the daughter's children, or if she left none, to the grantor's next of kin.

In *Becker* v. *St. Louis Trust Co., supra,* the decedent had declared himself trustee of property with the income to be accumulated or, at his discretion, to be paid over to his daughter during her life. The instrument further provided that "If the said beneficiary should die before my death, then this trust estate shall thereupon revert to me and become mine immediately and absolutely, or . . . if I should die before her death, then this property shall thereupon become hers immediately and absolutely . . . ."

[3] Some indication of the influence of Klein v. United States upon the lower courts may be found in Sargent v. White, 50 F. (2d) 410 and Union Trust Co. v. United States, 54 F. (2d) 152, cert. denied, 286 U. S. 547. Cf. Commissioner v. Schwarz, 74 F. (2d) 712.

On the authority of the *Klein* case the Commissioner had included
the taxable estates the gifts to which, in the *St. Louis Trust* cases,
grantor's death had given definitive measure. If the wife had
deceased the settlor in the *Klein* case, he would have been re-
sessed of his property. His wife's interests were freed from this
tingency by the husband's prior death, and because of the effect
his death this Court swept the gift into the gross estate. So in
lvering v. *St. Louis Trust Co.,* the grantor would have become
ossessed of the granted corpus had his daughter predeceased him.
t he predeceased her and by that event her interest ripened to
l dominion. The same analysis applies to the *Becker* case. In
three situations the result and effect were the same. The event
ich gave to the beneficiaries a dominion over property which
y did not have prior to the donor's death was an act of
ure outside the grantor's "control, design or volition." 296
S. 39, 43. But it was no more and no less "fortuitous", so far
he grantor's "control, design or volition" was concerned, in the
Louis Trust cases than it was in the *Klein* case. In none of the
ee cases did the dominion over property which finally came to
beneficiary fall by virtue of the grantor's will, except by his
vision that his own death should establish such final and com-
te dominion. And yet a mere difference in phrasing the circum-
nce by which identic interests in property were brought into
ng—varying forms of words in the creation of the same ~~[illegible]~~ worldly
erests—was found sufficient to exclude the *St. Louis Trust* settle-
nts from the application of the *Klein* doctrine.

'our members of the Court saw no difference. They relied on
governing principle of § 302(c) that Congress meant to in-
le in the gross estate *inter vivos* gifts "which may be resorted
as a substitute for a will, in making dispositions of property
rative at death." 296 U. S. at 46. To effectuate this purpose
ctical considerations applicable to taxation and not the "niceties
he art of conveyancing" were their touchstone. "Having in
d", said the dissenters, "the purpose of the statute and the
adth of its language it would seem to be of no consequence what
ticular conveyancers' device—what particular string—the de-
nt selected to hold in suspense the ultimate disposition of his
perty until the moment of his death. In determining whether
xable transfer becomes complete only at death we look to sub-
ce, not to form . . . . However we label the device it is
a means by which the gift is rendered incomplete until the

MICRO C

TRADE MA

39

1159

CARD

ARK ®

22

MATTHEW BENDER & COMPANY

MB

65

microcard

donor's death." 296 U. S. at 47. For the majority in the *St. Louis Trust Company* cases, these practicalities had less significance than the formal categories of property law. The grantor's death, the majority said, in *Helvering v. St. Louis Trust Co.*, "simply put an end to what, at best, was a mere possibility of a reverter by extinguishing it—that is to say, by converting what was merely possible into an utter impossibility." 296 U. S. 39, 43. This was precisely the mode of argument which had been rejected in *Klein v. United States, supra.*

We are now asked to accept all three decisions as constituting a coherent body of law, and to apply their distinctions to the trusts before us.

In Nos. 110, 111 and 112 (*Helvering v. Hallock*) the decedent in 1919 created a trust under a separation agreement, giving the income to his wife for life, with this further provision:

> "If and when Anne Lamson Hallock shall die and in such event . . . the within trust shall terminate and said Trustee shall . . . pay Party of the First Part if he then be living any accrued income, then remaining in said trust fund and shall . . . deliver forthwith to Party of the First Part the principal of the said trust fund. If and in the event said Party of the First Part shall not be living then and in such event payment and delivery over shall be made to Levitt Hallock and Helen Hallock, respectively son and daughter of the Party of the First Part, share and share alike . . . ."

When the settlor died in 1932, his divorced wife, the life beneficiary, survived him. The Circuit Court of Appeals held that the trust instrument had conveyed the "whole interest" of the decedent, subject only to a "condition subsequent," which left him nothing "except a mere possibility of reverter." *Commissioner v. Hallock*, 102 F. (2d) 1, 3-4.

In No. 183 (*Rothensies v. [redacted]*) the decedent by an ante-nuptial agreement in 1925 conveyed property in trust, the income to be paid to his prospective wife during her life, subject to the following disposition of the principal:

uston

> "In trust if the said Rae Spektor shall die during the lifetime of said George F. Uber to pay over the principal and all accumulated income thereof unto the said George F. Uber in fee, free and clear of any trust.
>
> "In trust if the said Rae Spektor after the marriage shall survive the said George F. Uber to pay over the principal and

> all accumulated income unto the said Rae Spektor—then Rae Uber—in fee, free and clear of any trust."

Mrs. Uber outlived her husband, who died in 1934. The Circuit Court of Appeals deemed *Becker* v. *St. Louis Trust Co.* controlling against the inclusion of the trust corpus in the gross estate.

Finally, in No. 399 (*Bryant* v. *Helvering*), the testator provided for the payment of trust income to his wife during her life and upon her death to the settlor himself if he should survive her. The instrument, which was executed in 1917, continued:

> "Upon the death of the survivor of said Ida Bryant and the party of the first part, unless this trust shall have been modified or revoked as hereinafter provided, to convey, transfer, and pay over the principal of the trust fund to the executors or administrators of the estate of the party hereto of the first part."

There was a further provision giving to the decedent and his wife jointly during their lives, and to either of them after the death of the other, power to modify, alter or revoke the instrument. The wife survived the husband, who died in 1930. The Board of Tax Appeals allowed the Commissioner to include in the decedent's gross estate only the value of a "vested reversionary interest" which the Board held the grantor had reserved to himself. On appeal by the tax-payer, the Circuit Court of Appeals sustained this determination.

The terms of these grants differ in detail from one another, as all three differ from the formulas of conveyance used in the *Klein* and *St. Louis Trust* cases. It therefore becomes important to inquire whether the technical forms in which interests contingent upon death are cast should control our decision. If so, it becomes necessary to determine whether the differing terms of conveyance now in issue approximate more closely those used in the *Klein* case and are therefore governed by it, or have a greater verbal resemblance to those that saved the tax in the *St. Louis Trust* cases. Such an essay in linguistic refinement would still further embarrass existing intricacies. It might demonstrate verbal ingenuity, but it could hardly strengthen the rational foundations of law. The law of contingent and vested remainders is full of casuistries. There are great diversities among the several states as to the conveyancing significance of like grants; sometimes in the same state there are conflicting lines of decision, one series ignoring the other. Attempts by the Board of Tax Appeals and the Circuit Courts of Appeal to ad-

minister § 302(c) by reference to these distinctions abundantly illustrate the inevitable confusion.[4] One of the cases at bar, No. 399, reveals vividly the snares which inevitably await an attempt to base estate tax law on the "niceties of the art of conveyancing." In connection with the ascertainment of its own death duties, the Supreme Court of Errors of Connecticut defined the nature of the interest which the decedent in that case retained after his *inter vivos* transfer. *Bryant* v. *Hackett,* 118 Conn. 233. And yet the nature of that interest under Connecticut law and the scope of the Connecticut Court's adjudication of that interest were made the subject of lively controversy before us. The importation of these distinctions and controversies from the law of property into the administration of the estate tax precludes a fair and workable tax system. Essentially the same interests, judged from the point of view of wealth, will be taxable or not, depending upon elusive and subtle casuistries which may have their historic justification but possess no relevance for tax purposes.[5] These unwitty diversities of the law of property derive from medieval concepts as to the necessity of a continuous seisin.[6] Distinctions which originated under a feudal economy when land dominated social relations are peculiarly irrelevant in the application of tax measures now so largely directed toward intangible wealth.

Our real problem, therefore, is to determine whether we are to adhere to a harmonizing principle in the construction of § 302(c), or whether we are to multiply gossamer distinctions between the

[4] See, for example, the attempts by the Board of Tax Appeals to deal with the peculiarities of New York law in the field of vested and contingent remainders. Elizabeth B. Wallace, 27 B. T. A. 902; Louis C. Raegner, Jr., 29 B. T. A. 1243. In both of these cases limitations which would probably have been "contingent" at "common law" were held to be "vested" under the New York statutory rule. Cf. Commissioner *v.* Schwarz, 74 F. (2d) 712; Flora M. Bonney, 29 B. T. A. 45.

[5] Cf. Lyeth *v.* Hoey, 305 U. S. 188, 194. See Paul, The Effect on Federal Taxation of Local Rules of Property in Selected Studies in Federal Taxation (2nd Series), pp. 23-28; Developments in the Law—Taxation, 47 Harv. L. Rev. 1209, 1238-41; Note, 49 Harv. L. Rev. 462.

[6] See, for example, Fearne, Contingent Remainders, (4th Am. Ed.), pp. 3-241; Gray, Rule Against Perpetuities (2nd Ed.), pp. 99-118; VII Holdsworth, History of English Law, 81 *et seq.*; 1 Simes, Future Interests, §§ 64-96. The confusion apt to be engendered by judicial forays into this field is well illustrated by the use of the term "possibility of reverter" by the majority in Helvering *v.* St. Louis Union Trust Co. "A possibility of reverter" is traditionally defined as the interest remaining in a grantor who has conveyed a determinable fee. The definition has not been thought to have any relation to the reversionary interest of a grantor who has transferred either a vested or contingent remainder in fee. See Gray, Rule Against Perpetuities (2nd Ed.), §§ 13-51.

present cases and the three earlier ones. Freed from the distinctions introduced by the *St. Louis Trust* cases, the *Klein* case furnishes such a harmonizing principle. Does, then, the doctrine of *stare decisis* compel us to accept the distinctions made in the *St. Louis Trust* cases as starting points for still finer distinctions spun out of the tenuosities of surviving feudal law? We think not. We think the *Klein* case rejected the presupposition of such distinctions for the fiscal judgments which § 302(c) demands.

We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.

Nor have we in the *St. Louis Trust* cases rules of decision around which, by the accretion of time and the response of affairs, substantial interests have established themselves. No such conjunction of circumstances requires perpetuation of what we must regard as the deviations of the *St. Louis Trust* decisions from the *Klein* doctrine. We have not before us interests created or maintained in reliance on those cases. We do not mean to imply that the inevitably empiric process of construing tax legislation should give rise to an estoppel against the responsible exercise of the judicial process. But it is a fact that in all the cases before us the settlements were made and the settlors died before the *St. Louis Trust* decisions.

Nor does want of specific Congressional repudiations of the *St. Louis Trust* cases serve as an implied instruction by Congress to us not to reconsider, in the light of new experience, whether those decisions, in conjunction with the *Klein* case, make for dissonance of doctrine. It would require very persuasive circumstances enveloping Congressional silence to debar this Court from re-examining its own doctrines. To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities.[7] Congress may not have had its attention di-

[7] We are not unmindful of amendments to the estate tax law to which other decisions of this Court gave rise. Thus by § 805 of the Revenue Act of 1936, c. 690, 49 Stat. 1648, Congress undid the construction which this Court gave the estate tax law in another connection by a decision rendered on the same day as were the St. Louis Trust cases. Cf. White *v.* Poor, 296 U. S. 98. This case arose under § 302(d) and not § 302(c). But, in any event, the fact of Congressional action in dealing with one problem while silent on the different

rected to an undesirable decision; and there is no indication that as to the *St. Louis Trust* cases it had, even by any bill that found its way into a committee pigeon-hole. Congress may not have had its attention so directed for any number of reasons that may have moved the Treasury to stay its hand. But certainly such inaction by the Treasury can hardly operate as a controlling administrative practice, through acquiescence, tantamount to an estoppel barring reëxamination by this Court of distinctions which it had drawn.[8] Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction of the Treasury and of Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.

---

problems created by the St. Louis Trust cases, does not imply controlling acceptance by Congress of those cases.

By the Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516, Congress displaced the construction which this Court put upon § 302(c) in those cases wherein it was held that the reservation by a decedent of a life estate in property conveyed *inter vivos*, did not constitute a sufficient postponement of the remainder to bring it into the grantor's gross estate. May *v.* Heiner, 281 U. S. 238; Burnet *v.* Northern Trust Co., 283 U. S. 782; Morsman *v.* Burnet, 283 U. S. 783; McCormick *v.* Burnet, 283 U. S. 784. The speculative arguments that may be drawn from *ad hoc* legislation affecting one set of decisions and the want of such legislation to modify another set of decisions dealing with a somewhat different though cognate problem are well illustrated by this remedial amendment. For it may be urged with considerable plausibility that in 1931 Congress had in principle already rejected the general attitude underlying the St. Louis Trust cases, as illustrated by the fact that in those cases the majority, in part at least, relied upon the Congressionally discarded May *v.* Heiner doctrine.

Whatever may be the scope of the doctrine that re-enactment of a statute impliedly enacts a settled judicial construction placed upon the re-enacted statute, that doctrine has no relevance to the present problem. Since the decisions in the St. Louis Trust cases, Congress has not re-enacted § 302(c). The amendments that Congress made to other provisions of § 302 in connection with other situations than those now before the Court, were made without re-enacting § 302(c). Nor has Congress, under any rational canons of legislative significance, by its compilation of internal revenue laws to form the Internal Revenue Code of 1939, 53 Stat. 1, impliedly enacted into law a particular decision which, in the light of later experience, is seen to create confusion and conflict in the application of a settled principle of internal revenue legislation.

Here, unlike the situation in such cases as National Lead Co. *v.* United States, 252 U. S. 140, 146-47, and Murphy Oil Co. *v.* Burnet, 287 U. S. 299, 302-3, we have no conjunction of long uniform administrative construction and subsequent reenactments of an ambiguous statute to give ground for implying legislative adoption of such construction. See Preface, Internal Revenue Code, 53 Stat. III; compare Smiley *v.* Holm, 285 U. S. 355, 373, and Warner *v.* Goldtra, 293 U. S. 155, 161.

[8] Since the Treasury has amended its regulations in an effort to conform administrative practice to the compulsions of the St. Louis Trust cases it cannot be deemed to have bound itself by this change. Art. 17, Reg. 80 (1937 Ed.), p. 42. Cf. Estate of Sanford *v.* Commissioner of Internal Revenue, 308 U. S. — (decided November 6, 1939).

This Court, unlike the House of Lords,[9] has from the beginning rejected a doctrine of disability at self-correction. Whatever else may be said about want of Congressional action to modify by legislation the result in the *St. Louis Trust* cases, it will hardly be urged that the reason was Congressional approval of those distinctions between the *St. Louis Trust* and the *Klein* cases to which four members of this Court could not give assent. By imputing to Congress a hypothetical recognition of coherence between the *Klein* and the *St. Louis Trust* cases, we cannot evade our own responsibility for reconsidering, in the light of further experience, the validity of distinctions which this Court has itself created. Our problem then is not that of rejecting a settled statutory construction. The real problem is whether a principle shall prevail over its later misapplications. Surely we are not bound by reason or by the considerations that underlie *stare decisis* to persevere in distinctions taken in the application of a statute which, on further examination, appear consonant neither with the purposes of the statute nor with this Court's own conception of it. We therefore reject as untenable the diversities taken in the *St. Louis Trust* cases in applying the *Klein* doctrine—untenable because they drastically eat into the principle which those cases professed to accept and to which we adhere.

In Nos. 110, 111, 112 and 183, the judgments are

Reversed.

In No. 399, the judgment is

Affirmed.

The CHIEF JUSTICE concurs in the result upon the ground that each of these cases is controlled by our decision in *Klein* v. *United States*, 283 U. S. 231.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[9] London Street Tramways Co., Ltd. *v.* London County Council, [1898] A. C. 375. But the rule is otherwise in the Privy Council. Read *v.* Bishop of Lincoln, [1892] A. C. 644, 655. For the rôle of precedent in English law, see, *inter alia*, 2 Yorke, Life of Lord Chancellor Hardwicke, pp. 425, 498; Goodhart, Precedent in English and Continental Law, 50 L. Q. Rev. 40; Holdsworth, Case Law, *ibid.* 180; Lord Wright in Westminster Council *v.* Southern Ry. Co., [1936] A. C. 511, 562-63; Allen, Law in the Making, 3rd ed., pp. 224 *et seq.*

SUPREME COURT OF THE UNITED STATES.

Nos. 110, 111, 112.—October Term, 1939.

Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* Hallock, et al.	}	On Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[January 29, 1940.]

Mr. Justice Roberts.

There is certainly a distinction in fact between the transaction considered in *Klein* v. *United States*, 283 U. S. 231, and those under review in *Helvering* v. *St. Louis Union Trust Company*, 296 U. S. 39, and *Becker* v. *St. Louis Union Trust Company*, 296 U. S. 48. The courts, the Board of Tax Appeals, and the Treasury have found no difficulty in observing the distinction in specific cases. I believe it is one of substance, not merely of terminology, and not dependent on the niceties of conveyancing or recondite doctrines of ancient property law.

But if I am wrong in this, I still think the judgments in Nos. 110-112, and 183 should be affirmed and that in 399 should be reversed. The rule of interpretation adopted in the *St. Louis Union Trust Company* cases should now be followed for two reasons: *First*, that rule was indicated by decisions of this court as the one applicable in the circumstances here disclosed, as early as 1927; was progressively developed and applied by the Board of Tax Appeals, the lower federal courts, and this court, up to the decision of *McCormick* v. *Burnet*, 283 U. S. 784, in 1931; and has since been followed by those tribunals in not less than fifty cases. It ought not to be set aside after such a history. *Secondly*. The rule was not contrary to any treasury regulation; was, indeed, in accord with such regulations as there were on the subject; was subsequently embodied in a specific regulation, and, with this background, Congress has three times reenacted the law without amending § 302(c) in respect of the matter here in issue. The settled doctrine, that reenactment of a

statute so construed, without alteration, renders such construction a part of the statute itself, should not be ignored but observed.

1. The Revenue Act of 1926 lays a tax upon the transfer of the net estate of a decedent. That estate is defined to embrace the value of all his property, real or personal, tangible or intangible (less certain deductions), at the time of his death.[1] As the Treasury Department stated in its earliest regulations: "The statute also includes only property rights existing in the decedent in his lifetime and passing to his estate."[2] In all the treasury regulations, from the earliest to the one now in force, applicable to the relevant sections of the successive Revenue Acts defining the "gross estate" of a decedent the Treasury has used this language:[3]

"The value of a vested remainder should be included in the gross estate. Nothing should be included, however, on account of a contingent remainder where [in the case] the contingency does not happen in the lifetime of the decedent, *and the interest consequently lapses at his death.*" (Italics supplied.)

The next sentence: "Nor should anything be included on account of a life estate in the decedent," has been repeated in substance in the corresponding article of all subsequent regulations.

If by the will of his grandmother A is given a life estate, with remainder to another, his executor is not bound to return anything on account of the life estate because, in respect of it, nothing passes on A's death. The estate simply ceases. The Treasury has never contended the contrary. If, however, A's grandmother gave a life estate to B, and the remainder to A, A has something which, at his death, will pass to someone else under his will, or under the intestate laws. The statute plainly taxes the value of the interest thus transferred at A's death.

If A's grandmother, by her will, gave interests in succession to specific persons and then provided that if A should outlive all these persons the property should pass to him, A would have a chance to receive and enjoy the property. If he did so receive it, it would pass as part of his estate. If he died before the other beneficiaries named by his grandmother his death would deprive him of that chance. The chance would not pass to any-

---

[1] Secs. 300-303, 44 Stat. 69-72.

[2] Regulations 37, Art. 12 (1917).

[3] Regulations 37, Art. 12; Regulations 63, Art. 11; Regulations 68, Art. 11; Regulations 80, Art. 11.

one else. No tax would be laid on the supposed value of his contingent interest or chance, because the chance cannot, at his death, pass by his will, or the intestate laws, to another. I do not understand the Government has ever denied this.

Subsection (c) of § 302 lays down no different rule respecting similar interests created by irrevocable deed or agreement of the decedent. The subsection directs that there shall be included in the gross estate the value, at the time of the decedent's death, of any interest in property of which the decedent has at any time made a *transfer* "intended *to take effect* in possession or enjoyment *at or* after his *death*" (excluding sales for adequate consideration).

A transfer can only take effect, within the meaning of the statute, by the shifting of possession or enjoyment from the decedent to living persons. The fact that the terms of the gift bring about some other effect at the decedent's death is immaterial. The fact that something may happen in respect of the beneficial enjoyment of the property conditioned upon the decedent's death is irrelevant so long as that something is not the shifting of possession or beneficial enjoyment from the decedent. This is made clear by *Reinecke v. Northern Trust Co.*, 278 U. S. 339, 347.

If A makes a present irrevocable transfer in trust, conditioned that he shall receive the income for life and, at his death, the principal shall go to B, B is at once legally invested with the principal. A's life estate ceases at his death. Nothing then passes. There is no tax imposed by the statute because there is no transfer any more than there would be in the case of a similar life estate given A by his grandmother. (This is *May* v. *Heiner*, 281 U. S. 238.) If, on the other hand, A creates an estate for years or for life in B, retaining the remaining beneficial interest in the property for himself, and, whether by the terms of the grant, or by the terms of A's will, or under the intestate law, that remainder passes to some one else at his death, such passage renders the transfer taxable. (This is *Klein* v. *United States, supra.*) If what A does is to transfer his property irrevocably, with provision that it shall be enjoyed successively by various persons for life and then go absolutely to a named person, but that if he, A, shall outlive that person, the property shall come back to him, and A dies in the lifetime of the person in question, A has merely lost the chance that the beneficial ownership of the property may revert to him. That chance cannot pass under his will or under the intestate laws

As there is no transfer which can become effective at his death by the shifting of any interest from him, no tax is imposed. (This is *McCormick* v. *Burnet, supra,* and *Helvering* v. *St. Louis Union Trust Company, supra.*)

2. These governing principles were indicated as early as 1927[4] and were thereafter developed, in application to specific cases, in a consistent line of authorities.

In *May* v. *Heiner, supra,* it was held that a transfer in trust under which the income was payable to the transferor's husband for his life and, after his death, to the transferor during her life, with remainder to her children, was not subject to tax as a transfer intended to take effect in possession or enjoyment at or after death. This court said (p. 243):

" . . . At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death *was obliterated by that event.*" (Italics supplied.)

It will be noted that this is the equivalent of the Treasury's statement, *supra,* that such an interest lapses at death.

That decision is indistinguishable in principle from the St. *Louis Union Trust Company* cases and the instant cases; and what was there said serves to distinguish the *Klein* case.

McCormick v. *Burnet* followed *May* v. *Heiner.* The court there held that neither a reservation by the grantor of a life estate with remainders over, nor a provision for a reverter in case all the beneficiaries should die in the lifetime of the grantor, made the gifts transfers intended to take effect in possession or enjoyment at or after the grantor's death. In the Circuit Court of Appeals the Commissioner urged that the provision for payment of the trust estate to the settlor in case she survived all the beneficiaries rendered the transfer taxable. That court dealt at length with the point and sustained his view. (43 F. (2d) 277, 279.) The Commissioner made the same contention in this court, but it was overruled upon the authority of *May* v. *Heiner.*

Then came the two *St. Louis Union Trust Company* cases, decided upon the authority of *May* v. *Heiner* and *McCormick* v. *Burnet.* Finally, the *McCormick* case was followed in *Bingham* v. *United States,* 296 U. S. 211.

---

[4] Shukert v. Allen, 273 U. S. 545.

Since the opinion of the court appears to treat the *St. Louis* cases as the origin of the principle there announced, it is important to emphasize the fact that the rule had been settled by this court as early as 1930; and to note other decisions rendered prior to the *St. Louis* cases. In seven, intervening between *May* v. *Heiner* and the *St. Louis* cases, the Board of Tax Appeals reached the same conclusion as that announced in the *St. Louis* cases.[5] The Board's action was affirmed in four of them.[6] Four other decisions by Circuit Courts of Appeal were to the same effect.[7] In practically all, reliance was placed upon *Shukert* v. *Allen*, *Reinecke* v. *Northern Trust Company*, *May* v. *Heiner*, and *McCormick* v. *Burnet*, or some of them. Thus, when the question came before this court again in the *St. Louis* cases, there was a substantial body of authority following and applying the *Heiner* and *McCormick* cases.

Since the *St. Louis* cases were decided, the principle on which they went has been repeatedly applied by the Board of Tax Appeals and the courts. The Board has followed the cases in no less than seventeen instances.[8]

The record is the same in the courts. The *St. Louis* cases have been followed in fourteen cases.[9] In some of these the Government has sought review in this court but in none, except those now presented, has it asked the court to overrule those decisions.

---

[5] Wheeler *v.* Commissioner, 20 B. T. A. 695; Duke *v.* Commissioner, 23 B. T. A. 1104; Peabody *v.* Commissioner, 24 B T. A. 787; Dunham *v.* Commissioner, 26 B. T. A. 286; Taylor *v.* Commissioner, 27 B. T. A. 220; Wallace *v.* Commissioner, 27 B. T. A. 902; Bonney *v.* Commissioner, 29 B. T. A. 45.

[6] Commissioner *v.* Duke, 62 F. (2d) 1057 (affirmed by an equally divided court, 290 U. S. 591); Commissioner *v.* Wallace, 71 F. (2d) 1002; Commissioner *v.* Dunham, 73 F. (2d) 752; Commissioner *v.* Bonney, 75 F. (2d) 1008.

[7] Commissioner *v.* Austin, 73 F. (2d) 758; Tait *v.* Safe Deposit & Trust Co., 74 F. (2d) 851; Tait *v.* Safe Deposit & Trust Co., 78 F. (2d) 534; Helvering *v.* Heimholz, 75 F. (2d) 245. I have been able to find only one case decided *contra*: Commissioner *v.* Schwarz, 74 F. (2d) 712.

[8] Taft *v.* Commissioner, 33 B. T. A. 671; Guaranty Trust Company *v.* Commissioner, 33 B. T. A. 1225; Kneeland *v.* Commissioner, 34 B. T. A. 816; Kienbusch *v.* Commissioner, 34 B. T. A. 1248; Schneider *v.* Commissioner, 35 B. T. A. 183; Van Sicklen *v.* Commissioner, 35 B. T. A. 306; Patterson *v.* Commissioner, 36 B. T. A. 407; Rushmore *v.* Commissioner, 36 B. T. A. 450; Bryant *v.* Commissioner, 36 B. T. A. 669; Wetherill *v.* Commissioner, 36 B. T. A. 1259; Mitchell *v.* Commissioner, 37 B. T. A. 1; Stone *v.* Commissioner, 38 B. T. A. 51; Harter Bank *v.* Commissioner, 38 B. T. A. 387; White *v.* Commissioner, 38 B. T. A. 593; Donnelly *v.* Commissioner, 38 B. T. A. 1234; Pyeatt *v.* Commissioner, 39 B. T. A. 774; Dravo *v.* Commissioner, 40 B. T. A. 309.

[9] Old Colony Trust Co. *v.* United States, 15 F. Supp. 417; Myers *v.* Magruder, 15 F. Supp. 488; Chase National Bank *v.* United States, 28 F. Supp. 947; Commissioner *v.* Brooks, 87 F. (2d) 1000; Bullard *v.* Commissioner, 90 F. (2d)

If there ever was an instance in which the doctrine of *stare de-*
sis should govern, this is it. Aside from the obvious hardship
nvolved in treating the taxpayers in the present cases differently
rom many others whose cases have been decided or closed in ac-
ordance with the settled rule, there are the weightier considera-
ions that the judgments now rendered disappoint the just ex-
ectations of those who have acted in reliance upon the uniform
onstruction of the statute by this and all other federal tribunals;
nd that, to upset these precedents now, must necessarily shake the
onfidence of the bar and the public in the stability of the rulings
f the courts and make it impossible for inferior tribunals to ad-
udicate controversies in reliance on the decisions of this court.
o nullify more than fifty decisions, five of them by this court,
ome of which have stood for a decade, in order to change a mere
ule of statutory construction, seems to me an altogether unwise
nd unjustified exertion of power. As I shall point out, there is
o necessity for such action because it has been, and still is open to
ongress to change the rule by amendment of the statute, if it
eems such action necessary in the public interest.

3. § 301 of the Revenue Act of 1926 imposes a tax upon the
lue of the net estate of a decedent. § 302 provides the method
r determining the value of the gross estate. Subsections (c) (d)
) (f) and (g) require inclusion in the gross estate of interests
hich otherwise might be held not to form a part of the decedent's
tate or not to pass from him to others at his death. These sub-
ctions sweep such interests into the gross estate in order to fore-
all tax avoidance. § 302(c) was the successor of analogous sec-
ns in earlier acts and the predecessor of similar sections in later
ts.[10] The subsection has been amended in successive Revenue
ts. As a result of the Treasury's experience in the enforcement
the law, Congress has from time to time thought it necessary to
tend the scope of the subsection in the interest of more efficient

; Welch *v.* Hassett, 90 F. (2d) 833; United States *v.* Nichols, 92 F. (2d)
; Mackay *v.* Commissioner, 94 F. (2d) 558; Commissioner *v.* Grosse, 100 F.
) 37; Commissioner *v.* Hallock, 102 F. (2d) 1; Commissioner *v.* Kaplan,
F. (2d) 329; Rothensies *v.* Cassell, 103 F. (2d) 834; Corning *v.* Commis-
ner, 104 F. (2d) 329; Rheinstrom *v.* Commissioner, 105 F. (2d) 642.

[10] Revenue Act of 1916, § 202(b), 39 Stat. 756, 777; Revenue Act of 1918,
2(c), 40 Stat. 1057, 1097; Revenue Act of 1924, § 302(c), 43 Stat. 253,
; Revenue Act of 1932, § 803(a), 47 Stat. 169, 279; Internal Revenue Code
1939, § 811(c), 53 Stat., Part 1, 1, 121.

administration. Within constitutional limits such extension is a matter of legislative policy for Congress alone.[11]

It is familiar practice for Congress to amend a statute to obviate a construction given it by the courts. The legislative history of § 302(c) demonstrates that Congress has elected not to make such an amendment to meet the construction placed upon it by this court in the *St. Louis* cases.

May v. *Heiner* was decided in 1930. The Treasury was dissatisfied with the decision and in three later cases attacked the ruling, amongst them *McCormick* v. *Burnet*. The court announced its judgments in these cases on March 2, 1931, reaffirming *May* v. *Heiner*. On the following day Congress adopted a joint resolution amending § 302(c) to tax a transfer with reservation of a life estate to the grantor, but, in so doing, it omitted to deal with a contingent interest reserved to the grantor or the possibility of reverter remaining in him, involved in both *Heiner* and *McCormick*. See *Hassett* v. *Welch*, 303 U. S. 303, 308-9. The omission is significant.

It may be argued that in the haste of preparing and passing the amendment the point was overlooked. But the joint resolution was reenacted by § 803 of the Revenue Act of 1932,[12] without any alteration to cover the point. The Revenue Act of 1934[13] amended § 302(d) of the Revenue Act of 1926 but did not change § 302(c) as it then stood.

The day the *St. Louis* cases were decided, this court announced its opinion in *White* v. *Poor*, 296 U. S. 98, construing § 302(d) of the Act of 1926. In order to make the section apply to such a situation as was disclosed in that case[14] the Congress, on June 22, 1936, by the Act of 1936,[15] amended it to preclude the construction the court had given it. Again Congress let § 302(c) stand as before and as construed in the *St. Louis* cases. Three revenue acts have since been adopted,[16] in none of which has the wording of §302(c) been altered. If there is any life in the doctrine often an-

---

11 Helvering v. City Bank Farmers Trust Co., 296 U. S. 85.

12 47 Stat. 169, 279.

13 48 Stat. 680, 752.

14 House Report on H. R. 12793.

15 49 Stat. 1648, 1744.

16 Revenue Act of 1937, 50 Stat. 813; Revenue Act of 1938, 52 Stat. 447; Internal Revenue Code, 53 Stat., Part 1, p. 1.

[pron]ounced that reenactment of a statute as uniformly construed by [t]he courts is an adoption by Congress of the construction given it, [t]his legislative history ought to be conclusive that the statute, as it [n]ow stands, means what this court has said it means.

Little weight can be given to the argument of the Government [t]hat the Treasury has not applied to Congress for alteration of the [s]ection because of the difficulty of wording a satisfactory amend[m]ent. A moment's reflection will show that it would be easy to [p]hrase such an amendment. Whatever the reason for the failure [t]o amend § 302(c), whether hesitancy on the part of the Treasury [t]o recommend such action, or the satisfaction of Congress with the [co]nstruction put upon the section by this court, or mere inadvert[e]nce, the fact remains that the section has been reenacted again and [a]gain with the courts' construction plain for all to read.

4. As shown by the matter above quoted from the Treasury [R]egulations affecting the estate tax,[17] a contingent interest is not [t]o be included in the taxable estate. In the light of this construc[ti]on, estate tax provisions were reenacted or amended in 1921, 1924, [1]926, 1928, 1931, 1932, 1934, 1935, 1936 and 1937.

At the bar counsel for the Government stated that it had always [b]een the view of the Treasury that the article in question applied [o]nly to § 302(a) and had no application to § 302(c). But we are [n]ot concerned with what the Treasury thought about the matter. [T]he regulations were issued to guide taxpayers in complying with [t]he Act. Section 302 is an entirety. Subsections (a) and (c) were [n]ot intended to contradict each other, but the latter was to supple[m]ent the former. The gross estate was to be computed according [t]o the section as a whole. It is hard to understand how the tax[p]ayer was expected to discriminate between a contingent interest [o]f a decedent under the will of his grandmother and a similar in[te]rest under an absolute deed executed by him *inter vivos*. If the [on]e did not pass from the decedent at death neither did the other. After the decisions in the *St. Louis* cases, the Treasury rendered [it]s regulations even more explicit. In Regulations 80 (Revised), [pr]omulgated October 26, 1937, a new Article 17 was inserted which

"The statutory phrase, 'a transfer . . . intended to take effect [in] possession or enjoyment at or after his death,' includes a transfer

[17] See Note 3, *supra*.

by the decedent . . . whereby and to the extent that the benefi[cial] title to the property . . . or the legal title thereto . . . re[mained] in the decedent at the time of his death and the pass[ing] thereof was subject to the condition precedent of his death. . .

"On the other hand, if, as a result of the transfer, there remain[ed] in the decedent at the time of his death no title or interest in the transferred property, then no part of the property is to be includ[ed] in the gross estate merely by reason of a provision in the instru[ment] of transfer to the effect that the property was to revert to the decedent upon the predecease of some other person or persons or the happening of some other event."

If theretofore doubt could have been entertained, it then mu[st] have vanished. And with this regulation in force, Congress ree[n]acted § 302(c) as so interpreted.

What, then, is to be said of the principle that reenactment of a statute which the Treasury, by its regulations, has interpreted in a given sense is an embodiment of the interpretation in the law as reenacted? Surely the principle cannot be avoided, as the Govern[-]ment argues, because the Treasury felt bound so to interpret § 302(c) by reason of this court's decisions. That fact should make application of the principle the more urgent.

Mr. Justice McReynolds joins in this opinion.

MICRO CARD 22

TRADE MARK ®

39

MATTHEW BENDER & COMPANY

1159 2

65

microcard